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No. 90-1256

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1990

CALIFORNIA ENERGY COMMISSION;
CALIFORNIA PUBLIC UTILITIES COMMISSION;
DEPARTMENT OF WATER AND POWER OF THE
CITY OF LOS ANGELES;
PUBLIC SERVICE DEPARTMENT OF THE CITY OF BURBANK;
PUBLIC SERVICE DEPARTMENT OF THE CITY OF GLENDALE;
WATER & POWER DEPARTMENT OF THE CITY OF PASADENA;
PACIFIC GAS AND ELECTRIC COMPANY;
SOUTHERN CALIFORNIA EDISON COMPANY;
and SAN DIEGO GAS & ELECTRIC COMPANY,
Petitioners,

v.

BONNEVILLE POWER ADMINISTRATION,
JAMES J. JURA, as Administrator;
JAMES WATKINS, as Secretary of the
Department of Energy of the United States of America;
and the UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

WILLIAM M. CHAMBERLAIN *
General Counsel
JONATHAN BLEES
Deputy General Counsel
CALIFORNIA ENERGY COMMISSION
1516 Ninth Street, MS-14
Sacramento, CA 95814
(916) 324-3237

REX E. LEE
CARTER G. PHILLIPS
GENE C. SCHAERR
DANIEL E. MALJANIAN
SIDLEY & AUSTIN
1722 "Eye" Street, N.W.
Washington, D.C. 20006
(202) 429-4266

* Counsel of Record

Counsel for Petitioners (More counsel on inside cover)

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

JANICE E. KERR
EDWARD W. O'NEILL
PETER G. FAIRCHILD
CALIFORNIA PUBLIC
UTILITIES COMMISSION
5066 State Building
505 Van Ness Avenue
San Francisco, CA 94102
(415) 557-2786

HOWARD V. GOLUB
STUART K. GARDINER
PACIFIC GAS AND
ELECTRIC COMPANY
Post Office Box 7442
San Francisco, CA 94120
(415) 973-2040

RICHARD K. DURANT
STEPHEN E. PICKETT
GLORIA M. ING
SOUTHERN CALIFORNIA
EDISON COMPANY
2244 Walnut Grove Avenue
Rosemead, CA 91770
(818) 302-1903

JOHN D. MCGRANE
RICHARD M. MERRIMAN
WILLIAM M. DUDLEY
REID & PRIEST
701 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20004
(202) 508-4080

JAMES K. HAHN
EDWARD C. FARRELL
STANTON J. SNYDER
DEPARTMENT OF WATER
AND POWER OF THE
CITY OF LOS ANGELES
111 North Hope Street
Los Angeles, CA 90012
(213) 481-6372

JAMES F. WALSH
E. GREGORY BARNES
SAN DIEGO GAS &
ELECTRIC COMPANY
110 West "A" Street
San Diego, CA 92101
(619) 699-5022

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REPLY BRIEF OF PETITIONERS

Notwithstanding the Government's efforts to cloud the matter with irrelevant detail, the principal issue in this case is remarkably simple—*viz.*, whether the Bonneville Power Administration ("BPA") has authority to allocate transmission capacity on the Pacific Intertie in a manner that the Government concedes "prefer[s] . . . Pacific Northwest utilities over Canadian and other extra-regional utilities" (Opp. 4). To answer this question, the Court need look no further than Congress's express command that Intertie capacity not needed by BPA must be "ma[d]e available to *all* utilities on a fair and non-discriminatory basis . . . ." 16 U.S.C. § 838d. This issue, moreover, has unusual practical importance. *If* the BPA has misconstrued its statutory authority (as the petition for certiorari demonstrates it has), it has thereby created an unjustified interregional transfer of wealth in the billions of dollars at the expense of Southwest consumers. See Pet. 3-4, 7, 21-23. And it has done so, not on the basis of any authority expressly granted to it by Congress in the statute, but rather on the basis of tenuous inferences from snippets of legislative history.

The Government's brief disputes none of these points. Instead, the Government (1) quibbles with petitioners over the direction, timing, and exact amount of the interregional transfer that has occurred and will continue (Opp. 15-16); (2) attempts to justify the BPA's policy on the basis of another statutory provision that was not relied upon by the BPA or the Ninth Circuit (Opp. 14); (3) invokes additional bits of legislative history which it claims support the BPA's policy (Opp. 11-15); and (4) argues that the preliminary issue concerning the amount of deference owed to the BPA's interpretation is not worthy of this Court's attention (Opp. 7-10). Each of these arguments merits a brief response.

1. As explained in the petition (at 21-23), one of the most important reasons for reviewing the Ninth Cir-

cuit's decision is the tremendous "economic interests at stake." *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 111 S. Ct. 615, 619 (1991). The Government initially tries to minimize the importance of these interests by suggesting that the real conflict is not between the interests of Northwest utilities and Southwest consumers, but rather between the interests of Northwest and Canadian utilities. See, *e.g.*, Opp. 3, 4, 11, 12-13 & n.8, 14.[1] Putting aside the unseemliness of BPA's argument, BPA is simply wrong, for two reasons.

First, the economic harm done to California consumers by the Intertie Policy results in substantial measure from BPA's decision to "paternalistically restrict[] price competition among Northwest utilities . . . ." *LADWP*, App. B24 (Norris, J., dissenting). Second, because California consumers purchase substantial quantities of electricity from Canadian utilities, and because, absent the Intertie Policy, competition between Canadian utilities and Northwest utilities would tend to keep the prices charged by Northwest utilities within reasonable bounds, the Policy's discriminatory treatment of Canadian utilities has a direct and powerful impact on California consumers. That is why, as Judge Norris pointed out in dissent earlier, "[t]he exclusion of Canadian power . . . discriminates against Southwest energy purchasers . . . ." App. B24 n.1 (Norris, J., dissenting) (emphasis added). Indeed, petitioners' estimate of the economic harm inflicted upon California consumers by the Intertie Policy (Pet. 21-23) is *in addition to* the obvious economic harm it inflicts upon Canadian utilities.

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[1] BPA also suggests, incorrectly, that the economic dispute in this case is between Northwest utilities and California utilities. Opp. 15. Higher prices paid by California utilities to Northwest utilities are passed on to California consumers. That is why the California Energy Commission and the California Public Utilities Commission—each charged by statute with protecting the interests of consumers—have consistently challenged the BPA's Intertie Policy, and that is why they are petitioners before this Court.

BPA's contention that its "experiment" with "more open competition" renders petitioners' complaints "premature" (Opp. 15) is equally groundless. First, the experimental rule applies only in limited circumstances. It is not even operative during Condition 1—the period when demand for the Intertie is greatest and when most surplus Northwest energy is sold. Indeed, as the Government observes elsewhere in its brief, the rule operated "on only 20 days out of the originally planned 18-month period." Opp. 6.

Second, even during days when the experimental rule takes effect, it has limited impact on prices charged by Northwest utilities because it still excludes competition from Canadian utilities as well as from BPA, which is the dominant seller of power in the Northwest. By themselves, these artifical limitations on competition impose enormous costs on Southwest consumers, in addition to the costs imposed by BPA's artificial limitations on competition *among* non-federal Northwest utilities. See *supra* p. 2. Thus, even if the BPA's experimental rule were implemented on a permanent basis (and there is no suggestion from BPA that it will be), most of the economic harm to Southwest consumers would continue.

2. Aside from the Government's misleading effort to downplay the economic significance of this case, what is perhaps most striking about the Government's brief is its lame analysis of the pertinent statutory language. For example, the Government nowhere quotes the dispositive provision of Section 6 of the Transmission Act, which provides in full:

> The Administrator shall make available to *all* utilities on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

16 U.S.C. § 838d (emphasis added). The statute could hardly be more clear in imposing upon the BPA a re-

sponsibility to allocate any "excess" transmission capacity—*i.e.*, that which is not needed to "transmit electric power generated or acquired by the United States"—to *all* utilities on a nondiscriminatory basis.

Section 6 of the Transmission Act therefore stands in stark contrast to Section 2 of the Preference Act, which clearly gives Northwest utilities priority in the *sale* of federal power. See 16 U.S.C. §§ 837 et seq. As a practical matter, what the BPA is attempting to do here is to bootstrap this statutory preference for Northwest utilities in the *sale* of federal power into a statutory preference for *transmission* capacity. But Congress has authorized only the former, and has expressly rejected the latter in Section 6 of the Transmission Act.

In a belated effort to give the BPA's interpretation some textual plausibility, the Government now points to a single statutory provision—the preface to the Transmission Act—which was never relied upon by the BPA or the Ninth Circuit.[2] That provision expresses Congress's purpose of "enabl[ing] the Secretary of Energy to carry out the policies of [the Preference Act] relating to the marketing of electric power from hydroelectric projects in the Pacific Northwest . . . ." 16 U.S.C. 838(a). The Government seeks to justify the BPA's admitted preference in favor of Northwest *utilities* on the ground that "Congress identified Pacific Northwest *power* as the intended beneficiary of the Act." Opp. 14 (emphasis added). On its face, the statutory language says nothing about Northwest utilities; it merely identifies the category of electric power to which the Act applies. Moreover, the provision refers only to *federal* power produced in the Northwest, whereas the Preference Act (to which the provision refers) allocates only

[2] Indeed, neither the BPA nor the Ninth Circuit ever cited *any* textual support for its interpretation of Section 6 of the Transmission Act.

federal power, not private power produced in the Northwest. See 16 U.S.C. §§ 837a, 837(c), (d).[3]

In short, the Government's implausible reading of the Transmission Act serves only to underscore the BPA's disregard for its governing statutes, and the corresponding need for review by this Court.

3. In their petition (at 20-21), the petitioners also pointed out a further, related reason why review by this Court is warranted: The heavy reliance upon legislative history by both the BPA and the Ninth Circuit flouts this Court's consistent teaching that, "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Neither the Ninth Circuit nor the BPA has been able to cite any legislative history that rises to a "clearly expressed legislative intention" to limit the Transmission Act's categorical nondiscrimination requirement to Northwest utilities. Viewed in the most favorable light, what the BPA and the Ninth Circuit have done is simply "narrow the plain meaning of [the] statute on the basis of a gestalt judgment as to what Congress probably intended." *Garcia* v. *United*

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[3] The Government similarly fails in its effort to prove that reading "all utilities" in Section 6 of the Transmission Act to mean "all utilities" instead of "all *Northwest* utilities" would create "anomalies in the statutory scheme." Opp. 14. The Government argues that because the Preference Act restricts the sale of federal power outside the Northwest when it is needed in the Northwest, a literal reading of Section 6 of the Transmission Act would "presumably" give Canadian power a "competitive advantage." *Id.* This argument makes no sense. At times when BPA is precluded by the statute from selling its power to California, it is not, by definition, a participant in the extraregional power market. Accordingly, use of the Intertie to transmit Canadian power could have no competitive effect whatsoever on BPA. And providing Canadian power "equal access" to the Intertie at other times obviously does not give it a competitive advantage.

States, 469 U.S. 70, 78 (1984). The approach is inappropriate and the result is plainly wrong.

The Government does not attempt to defend the Ninth Circuit's approach. To the contrary, the Government's brief reflects an obvious discomfort with the Ninth Circuit's heavy reliance on legislative history. *E.g.*, Opp. 12 ("Even if resort to the legislative record were appropriate . . . ."). The Government likewise does not defend the Ninth Circuit's reliance upon the two pieces of legislative history that formed the principal basis for the decision below. See Pet. 17-19.[4] Instead, the Government merely points to additional snippets of legislative history which are as inconclusive (or damaging to the BPA's position) as those on which the Ninth Circuit relied.[5] And, most important, the Government does not

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[4] The best the Government can do is to argue that one of those passages—a statement in the House Report regarding the status of Canadian power—does not conclusively *disprove* the Ninth Circuit's hypothesis that Congress intended to permit BPA to discriminate against Canadian non-treaty energy in allocating transmission capacity. Compare Opp. 12-13 with Pet. 18-19. But even this effort fails. Although the Report does "distinguish[] non-Treaty Canadian power from the priority access granted to Canadian Treaty Power" (Opp. 12), it does so by stating, unequivocally, that non-Treaty Canadian power "stands on the same basis as *any* other non-Federal energy." H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin. News 3342, 3350 (emphasis added). "Any other non-Federal energy," of course, includes non-Federal energy produced in the Northwest. See Pet. 18-19.

[5] For example, the Government now relies upon a page of the House Report in claiming that the sole purpose of the "fair and nondiscriminatory" language in the Transmission Act was "to preclude preference utilities [*i.e.*, cooperatives and publicly-owned utilities] from asserting that they had priority over investor-owned utilities to BPA's transmission services." Opp. 15. But the passage on which the Government relies does not remotely support the Government's assertion that this was the *sole* purpose, and any such suggestion is foreclosed by the broad language Congress chose. See *supra* pp. 3-4.

even claim that these passages—or any of the passages relied upon below—provide a "clearly expressed legislative intention" sufficient to override the plain meaning of Section 6 of the Transmission Act.

Thus, the Government, like the Ninth Circuit, has engaged in precisely the kind of erroneous analysis of legislative history that this Court has condemned. As previously explained (*supra* pp. 1-3), the consequence of that error in this case costs Southwest consumers billions of dollars. This Court should grant certiorari to correct that error and, in so doing, to make plain that a reviewing court may not rely upon legislative history to override or "narrow" a statute absent a clearly expressed congressional intention to that effect.

4. Petitioners also demonstrated that there exists a genuine disagreement among the circuits over whether an agency is entitled to the usual degree of deference in interpreting its governing statutes when it has a direct and immediate financial interest in its own decision, and that this disagreement reflects a more general conflict among the circuits over whether an agency is entitled to deference when it has any substantial incentive—pecuniary or otherwise—to misinterpret its organic statute. Pet. 13-15. The Government's initial answer to this argument is to quibble with petitioners' characterization of BPA's operations, claiming that "BPA [does not] operate[] as a traditional business . . . ." Opp. 8, note 3. This answer misses the point. Whether or not BPA is charged with turning a profit versus breaking even and paying back the Treasury, BPA is wholly dependent upon the revenues it collects to fund its operations and to meet its financial obligations. It therefore has a powerful incentive to misinterpret its governing statutes when doing so will have a substantial impact on its revenues—as is the case here.[6]

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[6] Indeed, BPA adopted its Intertie Access Policies principally as a mechanism for increasing its revenues. LTIAP, Administra-

The Government next asserts that this Court has already resolved this issue in *Aluminum Co. of America* v. *Central Lincoln People's Util. Dist.*, 467 U.S. 380, 389 (1984) (*ALCOA*). This is false. The dispute in *ALCOA* was between two BPA customer groups over their relative priority to receive certain BPA power. 467 U.S. at 388. Although the BPA had a temporary, incidental financial interest in the dispute arising from the fact that it had already entered a contract with one of the customer groups (*id.* at 383), it plainly did not have the kind of direct and ongoing financial stake in the interpretation of its governing statute that it has in this case. Here, as Judge Norris observed, the BPA's interpretation permits it to create a highly profitable cartel among itself and non-federal Northwest utilities. Pet. App. B24-B25.

That the Court did not decide the deference issue in *ALCOA* is demonstrated by the *subsequent* decision of the D.C. Circuit in *National Fuel Gas Supply Corp.* v. *FERC*, 811 F.2d 1563 (D.C. Cir.), cert. denied, 484 U.S. 869 (1987). There, the court observed with respect to the interpretation of a settlement agreement that "if the agency itself were an interested party . . . deference might lead a court to endorse self-serving views that an agency might offer," and that deference would therefore be "inappropriate." *Id.* at 1571. The Government's attempt to distinguish *National Fuel* on the ground that it dealt with the interpretation of a contract rather than a statute is unpersuasive. Agencies are ordinarily entitled to as much (if not more) deference in interpreting contracts subject to their jurisdiction as they are in inter-

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tor's Decision at 8, May 17, 1988 ("Our first concern [in establishing this Policy] was to retain sufficient Federal Intertie capacity for our own use to aid us in meeting our costs, including our Treasury payments."); NTIAP Overview of the Policy at 1, September 7, 1984 ("BPA's Policy enhances BPA's ability to recover revenue."); App. B13 & n. 2, C9, E63-E65.

preting their organic statutes. *E.g.*, *id.* at 1569-70; see also *Tarpon Transmission Co.* v. *FERC*, 860 F.2d 439, 441-42 (D.C. Cir. 1988). Accordingly, there is no reason why the principle articulated in *National Fuel* would apply with any less force in the context of statutory interpretation.

Indeed, the Ninth Circuit itself did not attempt to distinguish *National Fuel* on this or any other ground. It simply stated that it "disagreed" with the D.C. Circuit. See Pet. 14 (quoting App. A13). The Government does not dispute this point. This acknowledged disagreement between two important courts of appeals on an issue of general significance (given the number of federal proprietary agencies) warrants this Court's attention.

The Government's attempt to deny the existence of a square circuit conflict on the more general deference question is similarly erroneous. The Government does not dispute that the Third and Ninth Circuits have squarely held that deference *is* required in reviewing an agency's interpretation of its own authority. See Pet. 15. However, the Government falsely suggests that the D.C. Circuit in *Ohio Power Co.* v. *FERC*, 880 F.2d 1400 (D.C. Cir. 1989), rev'd on other grounds *sub nom. Arcadia, Ohio* v. *Ohio Power Co.*, 111 S. Ct. 415 (1990), refused to defer to the FERC's interpretation of a statute because the agency had not claimed deference. In fact, the court refused to defer because, although the statute involved FERC, the statute was not, in the court's view, "entrusted to FERC's administration." 880 F.2d at 1405. This holding reflected the D.C. Circuit's prior ruling in *New York Shipping Ass'n* v. *FMC*, 854 F.2d 1338, 1363 (D.C. Cir. 1988), cert. denied, 448 U.S. 1041 (1989) that it is "inappropriate for us to defer to the agency where, as here, it is interpreting not the meaning of a statute that Congress has charged it to administer, but rather a statute merely delimiting its jurisdiction . . . ." The conflict on this important issue could not be more apparent or worthy of review.

Finally, the Government's suggestion (Opp. 9) that this Court has already resolved the deference question posed by *Ohio Power* and *New York Shipping* is belied by the fact that the Court recently granted certiorari on—but ultimately did not reach—that very issue in *Arcadia, Ohio* v. *Ohio Power Co.*, 111 S. Ct. 415 (1990). See 58 U.S.L.W. 3620 (listing issues presented). The Government's suggestion is further refuted by a comparison between Justice Scalia's concurrence in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988), and Justice Brennan's dissent in that case. See *id.* at 386-87. Their disagreement over the proper interpretation of this Court's prior decisions demonstrates that the issue remains an open one. This case provides an opportunity for the Court to resolve this issue by addressing the more general question of the effect of agency self-interest on judicial review.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM M. CHAMBERLAIN *
General Counsel
JONATHAN BLEES
Deputy General Counsel
CALIFORNIA ENERGY COMMISSION
1516 Ninth Street, MS-14
Sacramento, CA 95814
(916) 324-3237

REX E. LEE
CARTER G. PHILLIPS
GENE C. SCHAERR
DANIEL E. MALJANIAN
SIDLEY & AUSTIN
1722 "Eye" Street, N.W.
Washington, D.C. 20006
(202) 429-4266

* Counsel of Record

JANICE E. KERR
EDWARD W. O'NEILL
PETER G. FAIRCHILD
CALIFORNIA PUBLIC
UTILITIES COMMISSION
5066 State Building
505 Van Ness Avenue
San Francisco, CA 94102
(415) 557-2786

HOWARD V. GOLUB
STUART K. GARDINER
PACIFIC GAS AND
ELECTRIC COMPANY
Post Office Box 7442
San Francisco, CA 94120
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RICHARD K. DURANT
STEPHEN E. PICKETT
GLORIA M. ING
SOUTHERN CALIFORNIA
EDISON COMPANY
2244 Walnut Grove Avenue
Rosemead, CA 91770
(818) 302-1903

JOHN D. MCGRANE
RICHARD M. MERRIMAN
WILLIAM M. DUDLEY
REID & PRIEST
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Suite 800
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AND POWER OF THE
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E. GREGORY BARNES
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ELECTRIC COMPANY
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